IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.462 OF 2005

1. M/s. Sesa Goa Ltd.
   a company incorporated under the
   Companies Act,1956 having its
   Registered address at Sesa Ghor,
   20 EDC Complex, Patto Panjim,
   Goa-403001.

2. M/s. Sesa Industries Ltd.
   a company incorporated under the
   Companies Act, 1956 having its
   Registered address at Sesa Ghor,
   20 EDC Complex, Patto Panjim,
   Goa-403001.

3. Mr. S.D. Kulkarni,
   Indian Inhabitant, residing at 12,
   "Pushkar", W.W. Pathare Marg.,
   Dadar, Mumbai-400028.

4. Mr.P.G.Kakodkar,
   Indian Inhabitant, residing at
   Palm Grove, Tonca, Panjim,
   Goa-403 001.

5. Mr.K.R.V. Subrahamanian,
   Indian Inahbitant, resident at 8,
   "Rushilla", 17-C, Carmichael Road,
   Mumbai 400 026.

6. Mr.A. Pradhan,
   Indian Inhabitant, residing at Villa No.2,
   Kamat Kinara, P.O. Caranzalem,
   Goa 403 002
   having his office address
   at Sesa Ghor, 20 EDC complex,
   Patto Panjim, Goa-403 001.

7. Mr.M.D. Phal,
   Indian Inhabitant, residing at H.No.1832,
   "Shahaji", Pundalik Nagar,Alto Prrvorim,
   Goa 403521 and having his office address
   at Sesa Ghor, 20 EDC Complex, Patto Panjim
   Goa-403 001.

8. Mr.P.K.Mukherjee,
Indian Inhabitant, residing at Flat No.301,
"Brindavan", Tonca, Caranzalem,
Goa 403 002 and having his office address
at Sesa Ghor, 20 EDC Complex, Patto Panjim
Goa-403 001.

9. Mr.A.K. Rai,
Indian Inhabitant, residing at Plot No.62,
Patel Estate, Near Football Grounds, Betim,
Bardez Goa 403 101 and having his office
at Sesa Ghor, 20 EDC Complex, Patto Panjim
Goa-403 001.

10 Mr.L.A. Dean,
residing at House No.8/290,
Near All India Radio, Altinho, Panjim,
Goa 403 001 and having his office address
at Sesa Ghor, 20 EDC Complex, Patto Panjim
Goa-403 001.

..Petitioners.

Vs.

1. State of Maharashtra.

2. Smt. Krishna Bajaj,
Adult, Indian Inhabitant,
Having her address at
24/25, Bharatiya Bhavan,
72, Marine Lines,
Mumbai 400 020.

..Respondents.

Mr. Amit Desai, Sr. Advocate with Shrirang Shrimani and Vijay Manjerkar i/by Udwadia and Udeshi for the petitioners.

Mr.Zal Andhyarujina with Mr. R.R. Bhosale i/by P.D. Desai for the Respondent No.2.

Mr.S.S.Pednekar, APP. for the Respondent No.1-State.

CORAM : R.S. MOHITE,J.
DATED : 01/3/2006.

ORAL JUDGMENT:

1. Heard both sides.

2. Rule. By consent, rule made returnable forthwith.

3. This writ petition can be disposed of on preliminary point. It appears that against an order dismissing a complaint under Section 73 of the Companies Act, 1956 a revision came to be filed in the Sessions Court. The persons who were cited as respondents in the complaint were not parties to the revision and the revision has been allowed without hearing the present petitioners who, according to the petitioners are parties affected by the impugned order passed by the Sessions Judge.

4. The point raised is that the impugned order passed in revision is vitiated as it has been passed without hearing the petitioners who were parties prejudiced by the order.

5. The Advocate for the petitioners has placed reliance on the judgment of the Apex Court in the case

of **Bhagirathi Vs. Kana Ram and another reported in 2001 Cri. L.J. 122.** In the said case before the Apex Court the Magistrate had not taken the cognizance of the criminal complaint as no prima facie case had been made out. The petition under Section 482 of the Code of Criminal Procedure had been filed in the High Court, impugning the order of dismissal of complaint without making the cited accused as parties and the order was reversed by the High Court without giving notice to any of the cited accused. The Apex Court remanded the matter back to the High Court for giving opportunity to the accused.

6. Another judgment cited on behalf of the petitioners is in the case of **Jeet Singh Vs. State of Rajasthan and anr. reported in 1994(3) Crimes Page 540** and decided by the Single Judge of the Rajasthan High Court. In the case before the Rajasthan High Court, the Magistrate has refused to issue process. The matter was carried in revision by the complainant and the court set aside the order and remanded the case back to the Magistrate. Aggrieved by this, the petition came to be filed before the Rajasthan High Court. In Paragraph 9 of the judgment and order the Single Judge of the Rajasthan High Court observed as follows:

> "It is true that the learned Magistrate has refused to issue the process. Though at the time of ordering issue of process it is not necessary for the Magistrate to hear the so called accused as it is all exparte proceedings and there is no provision either in Section 200 or 201 or 202 or any provision appearing in Chapter XV of the Code of Criminal Procedure to hear the accused before issuing process in a complaint. It is all exparte proceedings which have to be initiated on the basis of complaint and the evidence or other appended documents which are produced before the Magistrate to issue process or not to issue the process. But, when it is found by the Revisional Court that the process has been wrongly denied to the incumbent then at least the Revisional Court by virtue of the provisions of Sub Section (2) of Section 401 Cr.P.C. should have given a notice because while remanding the case the accused is likely to be prejudiced because the superior court after review of the material on the record finds the Magistrate has not proceeded correctly that is bound to affect the accused as there exists an order in favour of the so called accused though the same was passed without hearing him."

This judgment is directly under Section 401(2) of the Cr.P.C. The Single Judge of the Delhi High Court has held that while admitting the revision petition against the order of dismissal of a criminal complaint for breach of trust, to a regular hearing, it was required under the law to issue a notice to the accused by the Sessions Court and that it was mandatory for the Sessions Judge while exercising his powers of revision not to make any order which would prejudice the accused or other person unless he had been given an opportunity of being heard.

7. The reasoning of the Delhi High Court, which also find favour with me was that under Section 482(2) of the Criminal Procedure Code, 1973 the words "or other person" have been added. These words were absent in the corresponding old Section 439(2) of the Criminal Procedure Code 1898. Obviously these words cannot have same connotation as the words "accused" which preceded them.

8. It is obvious that if a complaint is dismissed then any person arrayed as accused in the complaint will be affected by any order of the process if directed to be issued in exercise of revisional powers as that person will thereafter had required to face the trial and it is thus necessary under law to hear such person in any revision which may be filed, impugning an order refusing process before the revision is finally decided.

9. The Advocate for the Respondent No.2 has placed reliance upon the judgment of the Delhi High Court in the case of **J.K. International Vs.State reported in 2002 Cri.L.J 2601.** The facts before the Delhi High Court were that in a Criminal complaint the Magistrate had started an inquiry to find out whether there was

sufficient ground to proceed. While the inquiry was in progress, the complaint was dismissed because the complainant remained absent. The order dismissing the complaint was directly challenged in the Delhi High Court by filing a petition under Section 482 of the Criminal Procedure Code, 1898. When the above petition came up for hearing, counsel argued that since the complaint was dismissed without summoning the accused persons, grant of hearing to such accused persons are not necessary in the High Court. These accused persons were not impleaded as party respondents in the petition under Section 482 of the Cr.P.C. In the matter, on behalf of the State, a preliminary objection was raised that the notice to accused persons was essential. The Delhi High Court observed that the question as to whether in a petition challenging an order dismissing a complaint in default at the pre summoning stage, notice to the accused persons is necessary or not was likely to arise in several cases and therefore, the court appointed Sr. Counsel as amicus curie and after referring the provisions of Section 398 and 401 of the Cr.P.C. came to the conclusion that it was not necessary to hear the accused. In the circumstances, the Delhi High Court set aside the impugned order dismissing the complaint in default and directed the Trial Court to proceed with the complaint in accordance

with law.

10. It is clear that the judgment of the Delhi High Court cited on behalf of the Respondent No.2 vests upon a different set of facts. In that case, the complaint had not been dismissed on merits but had been dismissed at the stage prior to considering whether process ought to have been issued on merits. In any case an inquiry was still under progress and the matter was closed at a "pre summoning stage". That was not a case where the court had refused to issue process on the merits of the complaint. By setting aside the order dismissing the complaint in default, the matter was restored to the position of an inquiry. It was in such a background that the Delhi High Court concluded that the notice to the accused was not necessary. It is clear from the reading of the said judgment that the interpretation of Section 393 or Section 401(2) were not in issue.

11. Even on the bare reading of Section 397, 398 and 482 of the Cr.P.C., it is possible to logically arrive at the conclusion to the effect that the cited accused will have to be heard when revisional powers are exercised. Under Section 397 of the Code, High Court or the Sessions Court can call for record and proceeding for the purpose of satisfying itself or

himself as to the correctness, legality or proprietary of any finding, sentence or order. Once the record and proceeding are called in a case then in certain cases including a case where complaint has been dismissed under Section 203 of the Cr.P.C., Sessions Court or the High Court can direct the Chief Judicial Magistrate to make further inquiry into the complaint.

12. In exercise of the powers under Section 398 in relation to complaint dismissed under Section 203 of the Code, if an inquiry is directed, there is no statutory requirement of hearing the persons who are arrayed as an accused. If however, the Sessions Judge decides to exercise his revisional powers which are separately provided for under Section 399 then by application of Section-397(2), the provisions of Section 401(2) are made applicable to such revisional proceedings. Under Section 401(2), the revisional court cannot pass an order to the prejudice of the accused or other person unless he had been an opportunity of being heard either personally or by a pleader in his own defence. In my view, any order setting aside dismissal of the complaint would prejudice the persons who had been cited as accused in a criminal complaint and though they may not be accused before the court they would fall in the category of

"other persons" and would be prejudiced by order impugning the revision.

13. In this view of the matter, on the preliminary issue itself, I am inclined to quash and set aside the impugned judgment and order dated 21.8.2004 passed by the Additional Sessions Judge,Greater Bombay in Revision Application No.509/2004 (wrongly typed as Criminal Appeal No.509/2004). On remand, the Sessions Court will allow the applicant to amend the revision memo and to add all the persons shown as accused in the complaint as party respondents and thereafter hear the revision after service is effected in accordance with law. It is expected that the revision application should be heard expeditiously as early as possible and the Revisional Court will decide the same within a period of six months from the date of receipt of the writ of this court. It is made clear that the petition is disposed off only on the preliminary point and all issues are kept open. Rule made absolute in the aforesaid terms.

(R. S. MOHITE, J.)